IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
HERBERT VEDERMAN	:	NO. 15-346-2
ROBERT BRAND	:	NO. 15-346-3
KAREN NICHOLAS	:	NO. 15-346-4

MEMORANDUM

Bartle, J. April 5, 2016

Now before the court are the motions of defendants Herbert Vederman ("Vederman"), Robert Brand ("Brand"), and Karen Nicholas ("Nicholas") for severance of the charges against them pursuant to Rule 14 of the Federal Rules of Criminal Procedure.

The Grand Jury has returned a multi-count indictment against defendants Chaka Fattah, Sr. ("Fattah"), Vederman, Brand, Nicholas, and Bonnie Bowser ("Bowser").[1] All five defendants are charged in Count One of the indictment with conspiracy to commit racketeering ("RICO conspiracy") in violation of 18 U.S.C. § 1962(d). On March 18, 2016, the court denied the motions of each defendant to dismiss Count One for failure to state an offense. See Order dated March 18, 2016 (Doc. # 218).

1. Also named as unindicted coconspirators are Thomas Lindenfeld and Gregory Naylor.

In addition to RICO conspiracy, defendant Vederman is charged with: conspiracy to commit bribery under 18 U.S.C. § 371 (Count Sixteen); bribery under 18 U.S.C. § 201(b)(1) (Count Eighteen); bank fraud under 18 U.S.C. §§ 1344 and 2 (Count Nineteen); false statements to financial institutions under 18 U.S.C. §§ 1014 and 2 (Count Twenty); falsification of records under 18 U.S.C. §§ 1519 and 2 (Count Twenty-One); money laundering under 18 U.S.C. §§ 1957 and 2 (Count Twenty-Two); and conspiring to commit money laundering under 18 U.S.C. § 1956(h) (Count Twenty-Three). The indictment alleges that defendant Brand also committed wire fraud conspiracy under 18 U.S.C. §§ 1343 and 1349 (Count Two). The additional offenses charged against Nicholas are: conspiracy to commit wire fraud under 18 U.S.C. § 1343 and 1349 (Count Two); three counts of wire fraud under 18 U.S.C. § 1343 (Counts Twenty-Four through Twenty-Six); and two counts of falsification of records under 18 U.S.C. § 1519 (Counts Twenty-Eight and Twenty-Nine.[2]

I.

Rule 8(b) of the Federal Rules of Criminal Procedure permits the Government to charge two or more defendants in a single indictment if those defendants "are alleged to have participated in the same act or transaction, or in the same

2. On March 29, 2016, we dismissed Count Twenty-Seven, in which Nicholas was charged with money laundering under 18 U.S.C. § 1957. See Order dated March 29, 2016 (Doc. # 224).

series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count."

Among other things, Rule 8(b) "provides substantial leeway to prosecutors who would join racketeering defendants in a single trial." United States v. Eufrasio, 935 F.2d 553, 567 (3d Cir. 1991). Moreover, it is "customary to try persons charged as co-conspirators together." United States v. Inigo, 925 F.2d 641, 656 (3d Cir. 1991). Rule 8(b) "allows for joinder of a conspiracy charge and substantive counts arising out of that conspiracy, 'since the claim of conspiracy provides a common link, and demonstrates the existence of a common scheme or plan.'" United States v. Judge, 447 F. App'x 409, 416 (3d Cir. 2011). Defendants who are alleged to have participated in a single conspiracy "should ordinarily be tried together for purposes of judicial efficiency and consistency, even if the evidence against one is more damaging than against the other." United States v. Ward, 793 F.2d 551, 556 (3d Cir. 1986).

A court may sever counts that have been properly joinder under Rule 8(b) and order separate trials if joinder "appears to prejudice a defendant . . . ." Fed. R. Crim. P. 14(a); see also United States v. Riley, 621 F.3d 312, 335 (3d Cir. 2010). The decision whether to sever defendants or

counts under Rule 14 is committed to the sound discretion of the district court, which must "balance the public interest in joint trials against the possibility of prejudice inherent in the joinder of defendants." Eufrasio, 935 F.2d at 558.

A defendant requesting severance under Rule 14 bears a "heavy burden." United States v. Quintero, 38 F.3d 1317, 1343 (3d Cir. 1994). The Supreme Court has recognized that "[t]here is a preference in the federal system for joint trials of defendants who are indicted together." Zafiro v. United States, 506 U.S. 534, 537 (1993). Where an indictment charges conspiracy, "severance of a co-conspirator's trial is required only for compelling reasons." Inigo, 925 F.2d at 656.

To show that severance is warranted, a defendant must show that "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence," by "pinpoint[ing] clear and substantial prejudice resulting in an unfair trial." Riley, 621 F.3d at 335.

A defendant is "not entitled to severance merely because they may have a better chance of acquittal in [a] separate trial[]." Zafiro, 506 U.S. at 540; see also Riley, 621 F.3d at 335. Nor is severance warranted "merely because the evidence against a co-defendant is more damaging than that against" the movant. United States v. Adams, 759 F.2d 1099,

1112 (3d Cir. 1985) (quoting United States v. Dansker, 537 F.2d 40, 62 (3d Cir. 1976)). Instead, there must be "some exacerbating circumstances, such as the jury's inability to 'compartmentalize' the evidence," that give rise to a risk of unfair prejudice. Id. at 1112-13; see also United States v. John-Baptiste, 747 F.3d 186, 197 (3d Cir. 2014). Such a risk of prejudice can arise "[w]hen many defendants are tried together in a complex case and they have markedly different degrees of culpability." Zafiro, 506 U.S. at 540.

II.

Vederman, Brand, and Nicholas each argue that the charges against them should be severed from the rest of the indictment pursuant to Rule 14 on the ground that they are prejudiced by having been joined with the other defendants.[3] In essence, each makes a similar series of arguments. Each urges that the charges against them are drastically different from those faced by their codefendants and that their involvement in the common set of alleged facts was extremely limited. They also contend that they are at risk of being prejudiced by "spillover" evidence introduced against their codefendants. They further argue that this risk is especially great because of

3. Vederman also appears to argue misjoinder under Rule 8(b). Brand and Nicholas, in contrast, appear to argue only that the claims against them should be separated from the others in the indictment under Rule 14.

the "provocative" nature of this case, which involves a sitting member of Congress and allegations of public corruption.

These arguments advanced by Vederman, Brand, and Nicholas in favor of severance might have more force if the three of them were not all implicated in the RICO conspiracy charged in Count One. As explained above, courts have routinely recognized the leeway afforded to prosecutors to join the trials of racketeering defendants, particularly when a conspiracy to commit racketeering is involved. See, e.g., Judge, 447 F. App'x at 416; Eufrasio, 935 F.2d at 567. Similarly, courts have been reluctant to grant severance under Rule 14 of the claims against such defendants, even when presented with arguments that a particular racketeering defendant will be prejudiced by evidence of conduct of his codefendants in which he was not involved. E.g., Eufrasio, 935 F.2d at 567-69.

The decision of our Court of Appeals in Eufrasio is instructive in this regard. In that case, four defendants were charged with racketeering, extortion, illegal gambling, and, like the defendants here, with racketeering conspiracy. 935 F.2d at 562. Only one of the defendants was charged with an additional racketeering predicate which involved participation in a murder conspiracy. Id. Following a trial, his codefendants argued on appeal that their trials should not have been joined with his under Rule 8(b) because they were "wholly

unconnected with and unaware of the murder conspiracy." Id. at 566. The Court of Appeals disagreed. It observed that Rule 8(b)

> permits joinder of defendants charged with participating in the same racketeering enterprise or conspiracy, even when different defendants are charged with different acts, so long as indictments indicate all the acts charged against each joined defendant (even separately charged substantive counts) are charged as racketeering predicates or as acts undertaken in furtherance of, or in association with, a commonly charged RICO enterprise or conspiracy.

Id. at 567. A RICO conspiracy charge, the Court explained, "provides that required link" necessary for joinder of a conspiracy count and substantive counts arising out of that conspiracy. Id. The Court thus concluded that the charges against each defendant had properly been joined. Id.

For similar reasons, the Eufrasio court rejected the codefendants' arguments that the district court had abused its discretion in denying their Rule 14 motions. According to the Court of Appeals, severance of those codefendants' trials was not required, "even if some potential for prejudice might be associated with evidence of the . . . murder conspiracy predicate." Id. This was so because "the public interest in judicial economy favored joinder," particularly given that much of the evidence at issue would have been admissible against each

defendant in separate trials. Id. In short, the public interest in joinder outweighed the potential for prejudice arising from the evidence of the murder conspiracy. Id. at 569.

As was the situation in Eufrasio, the movants have been charged with racketeering conspiracy and with offenses arising out of the same conduct that serves as the basis for the RICO conspiracy charge. The RICO conspiracy claim "provides a common link" between the "substantive counts arising out of that conspiracy," and "demonstrates the existence of a common scheme or plan" involving all five defendants. See Judge, 447 F. App'x at 416. The purportedly disparate acts with which each movant is charged are all in reality "charged as . . . acts undertaken in furtherance of, or in association with, a commonly charged RICO enterprise or conspiracy." See Eufrasio, 935 F.2d at 567. In sum, Vederman, Brand, and Nicholas are all "alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." See Fed. R. Crim. P. 8(b). The charges against them were properly joined in this case pursuant to Rule 8(b).

For similar reasons, there is no basis for severing the movants' trials pursuant to Rule 14 because joinder of the claims before us does not "appear[] to prejudice" any defendant. See Fed. R. Crim. P. 14(a). As noted above, in making this determination we must "balance the public interest in joint

trials against the possibility of prejudice inherent in the joinder of defendants." Eufrasio, 935 F.2d at 558. Particularly in a RICO conspiracy case like this one, interests of judicial economy weigh heavily in favor of a single trial. See Ward, 793 F.2d at 556. The evidence that will be presented against Vederman, Brand, and Nicholas at trial relates to the RICO conspiracy with which all five defendants are charged. If any one of these defendants was to be tried separately, the efforts of counsel and the courts would have to be duplicated. Contrary to the movants' arguments, severance would not resolve any "manageability issues" but would instead create them.

As we have explained above, the trial of a defendant charged with RICO conspiracy should be severed from that of his codefendants "only for compelling reasons." See Inigo, 925 F.2d at 656. None of the three movants has met his or her burden of identifying "clear and substantial prejudice" or a serious risk thereof. See Riley, 621 F.3d at 335. They urge that the jurors will be unable properly to cabin their consideration of the evidence, resulting in a risk of "spillover." We emphasize, however, that "[j]uries . . . 'are presumed to follow their instructions.'" Riley, 621 F.3d at 335 (quoting Zafiro 506 U.S. at 540-41). Our Court of Appeals has frequently opined that properly crafted jury instructions can cure the prejudice that might otherwise result from a joint trial. See, e g., id.;

John-Baptiste, 747 F.3d at 197-98; United States v. Jimenez, 513 F.3d 62, 83 (3d Cir. 2008). We are not convinced that the jury will be unable to "compartmentalize" the evidence before it. See Adams, 759 F.2d at 1112-13.

The movants also contend that the "provocative" character of the charges faced by their codefendants will prejudice the jury against them. Vederman notes, for example, that the charges against Fattah, a member of Congress, involve allegations of "personal greed and abuse of [Fattah's] office." Vederman posits that "[a]ny potential juror could be outraged in hearing these allegations about the misuse of public and charitable funds." We reiterate, however, that in Eufrasio our Court of Appeals denied the Rule 14 motions of two defendants even though their codefendant had been charged with conspiring to commit murder. See 935 F.2d at 562. We cannot see why the public corruption allegations against Fattah would be so "provocative" and sensational as to justify severance when allegations of a murder conspiracy are not. See id. Severance is not justified "merely because the evidence against a co-defendant is more damaging than that against" the movant. Adams, 759 F.2d at 1112 (quoting Dansker, 537 F.2d at 62).

In sum, the movants have not met their "heavy burden" of showing that severance is warranted under Rule 14. See

Quintero, 38 F.3d at 1343. Their motions are therefore being denied.

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ORDER

AND NOW, this 5th day of April, 2016, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of defendant Herbert Vederman for severance (Doc. # 116) is DENIED;

(2) the motion of defendant Robert Brand for severance (Doc. # 125) is DENIED; and

(3) the motion of defendant Karen Nicholas for severance (Doc. # 132) is DENIED.

BY THE COURT:

/s/ Harvey Bartle III
J.